Contractors in the Workplace

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Contractors in the Workplace

- ONE TEAM – ONE FIGHT
- ONE BIG, HAPPY FAMILY
- AN ARMY OF ONE

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Introduction

- Generally, conflict of interest (COI) laws and Standards of Ethical Conduct, including JER, do not apply to contractor employees, even when:
  - Performing the same/similar work
  - Working side-by-side in the federal workplace, contractor workplace, or on the battlefield
  - Different loyalties
  - Result? Ethical Issues and actual or apparent COIs

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Oath of Office

- Defending the Constitution
- Officers & Army Civilians
  - “I do solemnly swear/affirm that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter. So help me God.”

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Oath of Office

- Defending the Constitution
- Enlisted Members
  - “I do solemnly swear/affirm that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.”

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The Contractor's Oath

Victory thru Justice!

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Contractor Ethics “Rules”

- Certain COI laws (e.g. bribery)
- False statement/false claims laws
- Procurement Integrity Act
- Federal Acquisition Regulation (FAR)
  - (3.104) Procurement integrity
  - (3.2) Contractor gratuities to govt personnel
  - (9.1) Responsible contractors
  - (9.4) Debarment/Suspension
  - (9.5) Organizational and Consultant COI
  - (37.104) Personal Services Contracts

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Some Different Perspectives

- Treat certain contractor personnel like govt employees
- Use contract clauses
- Identify and remedy conflicts/issues on a case-by-case basis
- Let contractors self-regulate and self-report
- Amend Ethics laws and regulations to apply more broadly to govt contractors

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Why are Contractor Ethics Important Now?

- Many federal contractors
  - 72,000 contracts worth over $215B*
  - 5.6M contractor personnel worked on federal contracts**
  - DoD approximately 60% contractor personnel

* GSA Federal Procurement Data Center

** Data from Paul C. Light, The True Size of Government, (1999), as of 1996

Why are Contractor Ethics Important Now?

- The Competitive Sourcing Initiative
  - Open up 425,000 federal “commercial” jobs to public-private competition
  - OMB told agencies to compete 15% of commercial jobs by October
  - DoD competing 30,000 commercial civilian positions*
  - Army 3d wave initiative would subject 200,000+ employees and soldiers to competition (biggest competition ever)
  - DoE’s 1000-IT position competition (largest civilian competition ever)*

*Mark Everson, The President’s Management Agenda, An Update, The Journal of Public Inquiry, Fall/Winter 2002

Why are Contractor Ethics Important Now?

- OMB Cir. A-76 Revisions
  - Public-private competition should be the rule for all commercial activities
  - Agencies must presume all activities are commercial unless justified as inherently governmental

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Downsizing

- US Army AD strength in Desert Shield/Storm, 1990-91: 711,000
  - Army AD strength today (Iraq, Afghanistan, Kosovo, Bosnia, elsewhere): 487,000, 32% reduction
  - USN, USAF, similar reductions
  - USMC: 10% cut
- DoD civilian workforce, 1989: 1,075,437
  - 2002: 670,166, 38% reduction
  - DoD committed to reviewing 452,000 positions in commercial activities
  - DoD committed to removing 55,000 positions by end of FY 07

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Competitive Sourcing

"I cannot emphasize enough that competitive sourcing is not about outsourcing; nor is it about downsizing the workforce. Rather, competitive sourcing is about creating incentives and opportunities for efficiency and novation through competition. No one in the Administrati cares who wins the public-private competition. But we ver much care that government service is provided by those be ble to do so in terms of cost and quality, be that the priva sector or the government itself."

Statement by Angela Styles, before Subcommittee on Readiness, House Armed Services Committee, 25 Mar 03.

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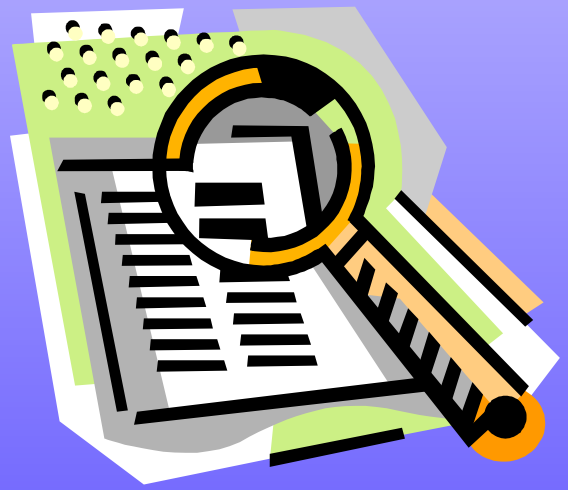
Traditional Contracts

- Procurement of supplies, equipment, weapons systems
- Services: maintenance, custodial, food services
- Construction



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Less Traditional – But Pervasive

- IT Help Desk
- Finance & Accounting (inherently governmental?)
- Travel & Transportation
- Personnel Admin
- Clerical & Admin
- Studies
- Action Officers

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Risk of Unlawful Personal Services Contracts

- Appearance of employer/employee relationship
- Prohibited unless authorized specifically by statute
  - Subverts civil service laws and OPM regulations

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History

- The NASA Experience
- This IS Rocket Science!

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Recent

- 1 February 2003
- Disaster – Loss of Space Shuttle Columbia
- Some Suggested:
  - Too much contractor authority
  - Too little Govt oversight and accountability
  - Austere budget
    - Safety compromised

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Earlier

- Early 1960's
- President Kennedy set the charter
  - Man on the Moon before the end of decade
- Rapid buildup
- Virtually unlimited budget

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Earlier

- Success on 20 July 1969 – Apollo 11
  - "Houston, Tranquility Base here. The Eagle has landed"
- Result
  - Neil Armstrong takes "One small step for Man; One giant leap for Mankind"

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Partnering w/ Industry

- Marshall Space Flight Center
  - Evolved from a “do-it-yourself, self-contained organization to a partner of industry”
- GAO Review of Support Service Contracts
  - Conclusion: Govt would have saved money by relying on civil servants rather than support service contractors
  - No determination of legality of contracts
  - Referred to Civil Service Commission (CSC) for further consideration

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Pellerzi Standards

- CSC GC, Leo Pellerzi determination
  - Contracts were illegal
- 3 Factors considered
  - On-sight contractor work using Govt equipment in tasks expected to take longer than one year
  - Established an employer-employee relationship
  - Had effect of creating new Govt positions using contract personnel to perform regular NASA work

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Pellerzi Standards

- "Standards"
  - Adopted by federal courts
  - Used to determine if contracts amount to illegal personal services
  - Circumventing civil service laws and regulations

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Test of Federal Employment

- Performance of a federal function
- Appointment or employment by a federal officer
- Supervision or direction by a federal officer

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Govt & Contractor Can:

- Understand and agree that the services to be delivered are nonpersonal services
- Recognize and agree that no employer-employee relationship exists under the contract b/w the govt and the contractor's personnel

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Contractor Personnel Cannot:

- Be placed in a position where they are under supervision, direction, or evaluation of a govt employee
- Be placed in a position of command, supervision, administration, or control over govt personnel, or over personnel of other contractors; or become part of the govt organization
- Be used in administration or supervision of govt procurement activities
- Query: Can contractor employees use Agency logo, seal, or name on business cards?

This is a job for a contractor!

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Selected Issues Agenda

- Identity – Who is a contractor?
- Gifts – To and from contractors
- Information security
- Relationships
- Awards
- Time management
- Use of resources
- Privatized Housing and Other PPV

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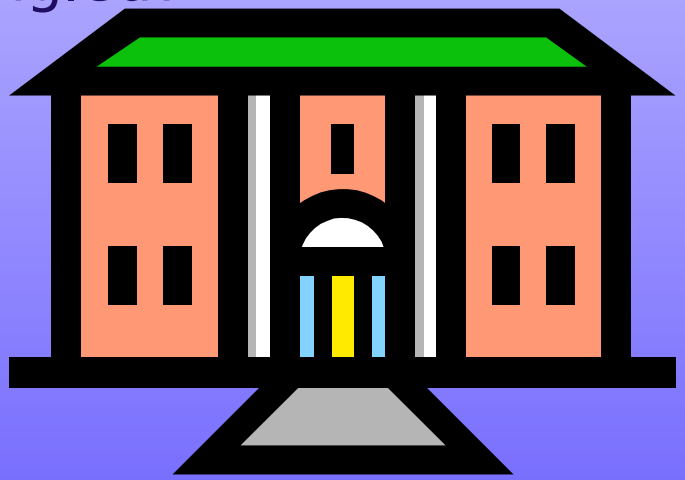
Identity

- Work site
  - Contractor space
  - Govt space
    - Segregated or intermingled?
  - Battlefield



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Personnel

- Identify contractor personnel in email, phone calls, meetings
- Be able to distinguish – badges or other identifier
- Be aware of different status
- Intergovernmental Personnel Act
  - 5 USC §§ 3371-3376

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Gifts

- Contractor employees are prohibited sources
  - General rule – no gifts solicited or accepted
  - No solicitation for retirement or other gift for govt employee

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Gifts

- Exceptions:
  - Item not a gift – coffee, donuts
  - Gift up to $20/occasion; $50/year
    - BUT no cash may be accepted in any amount
  - Based on personal relationship
    - Query: Can personal relationship be established on the job?
  - Widely attended gathering

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Gift Examples

- Office chief (govt) invites office members, including contractor employees, to dinner
  - Problem with gratuity to contractor?
  - Contractor brings bottle of fine wine or flower arrangement (>$20). Issues?
  - Contractor reciprocates; invites host to dinner. Problem?

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Gift Examples

- Organization Day Fund Raising
  - May contractors be asked to participate?
  - May we accept if contractor volunteers?
  - Hot dog/bake sale in workplace – May contractors purchase?
- Gifts to 9-11 victims/families; Enduring/Iraqi Freedom

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Information Security

- Classified
- Integrity of procurement process
  - Advance procurement info
  - Proprietary Info/Trade Secrets
    - FOUO – exempt from release under FOIA
    - Releasable to contractor only if protected by appropriate contract clauses and non-release declarations

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Statutes and Regulations

- Trade Secrets Act
  - Criminal to disclose a firm's trade secrets or confidential data
- Procurement Integrity
  - Proprietary information submitted with bids or proposals
- Standards of Ethical Conduct
  - Prohibits use of nonpublic info (by govt employees) for private gain (by anyone)

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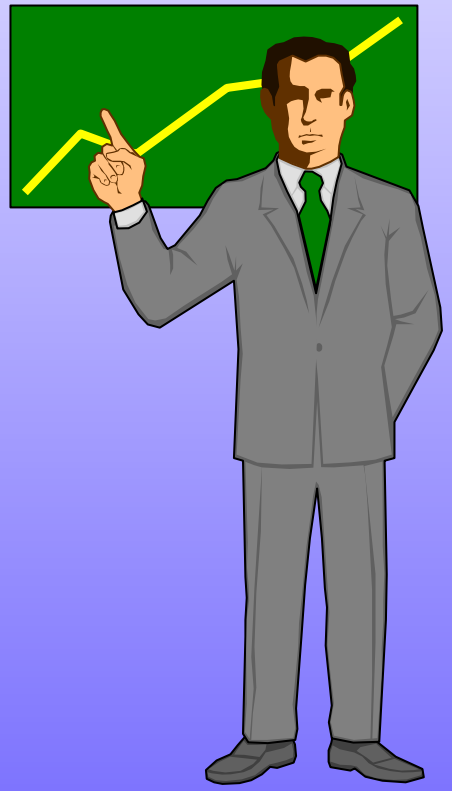
Information Protection



- Badges or other means to identify status
- Identify all members of audience before disclosing sensitive info
- Question contractor presence at meetings where sensitive issues may be discussed

Information Protection

- Segregate work spaces, where possible
- Protect proprietary info
  - Ensure distribution chain is secure
  - Limit email distribution

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Personal Relationships

- Varying degrees from acquaintance to marriage
- COIs must be identified and resolved
- Sensitive info must be protected
- Be aware of appearances and impact on working environment

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Awards

- Military personnel (10 USC 1124/1125) and civilian employee incentive awards (5 USC 4511-4513) are based on statute
  - Contractor employees are not authorized recipients of these awards
- Contracts may include provisions for awards (incentive fee; award fee; etc)

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Awards

- Contractors have their own awards and bonus programs
- Govt may provide honorary awards (certificates and other small items in agency honorary award program, DoD 1400.25-M, Subchp. 451, App 1 and 2)
  - Always coordinate proposed honorary award with contracting officer

Awards

- Query: May commander's coins be given to contractor employees?
  - Yes, but ONLY IF coins purchased with personal funds
  - No, if coins purchased with appropriated funds
  - DA Memo 600-70, 11 FEB 04
    - Paragraph 5d.(2)

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Time Management

- Contractor employees work on clock controlled by contractor supervisor – not govt supervisor
- Leave and other time off controlled by contractor supervisor
- Holidays and other time off governed by contract, not govt supervisor
  - "59 Minute Rule" and training holidays are unavailable to contractors

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Time Management

- Organization Day – May contractors participate? Yes, if:
  - Invited by govt, and
  - Contractor supervisor approves, and
  - Contractor employees are in leave or other non-billing status

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Use of Resources

- Contractor-furnished resources
  - At discretion of contractor – BUT – time billed to govt must be on performance of contract
- Govt-furnished resources
  - Used IAW govt furnished equipment clause in contract
  - Used only in performance of contract, unless contract allows other use
  - More restrictive than “authorized use” in JER
  - Query: May a contractor employee use a govt phone to call home? Send personal email on govt network?

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Public – Private Ventures (PPV)

- Privatized Housing
  - On and off military installations
  - Commander participation in ribbon cutting ceremonies
  - Advertising; Housing Office Role
  - Release of lists of incoming personnel to venture partner
  - Governing council; BOD (Army membership or liaison only?)
- How do we confront issue of endorsement of a particular NFE?

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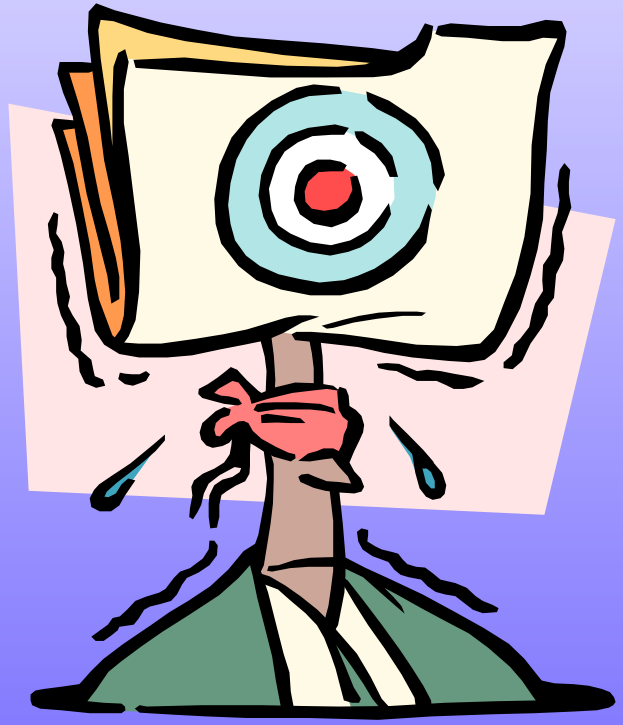
Questions?
Call Admininstrative Law.



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